Supreme Court, U.S.
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No. 00-484

In The

Supreme Court of the United States

FREDERICK HARRIS, ET AL.,

Petitioners,

v.

WAYNE GARNER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals correctly concluded that a prisoner must exhaust his administrative remedies prior to initiating litigation, as dictated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)?

2. Whether this Court should grant certiorari on the issue of due process as it is applied to the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) when the issue was not addressed by the courts below?

3. Whether this Court should grant certiorari to determine if allegations of abuse of prisoners falls within Congress' broad definition of "conditions of confinement," where that issue was not addressed by the courts below?

4. Whether Congress has the authority to limit claims for monetary damages in actions brought under 42 U.S.C. § 1983 where a prisoner has alleged a *de minimus* injury and may receive injunctive relief?

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STATEMENT OF THE CASE

Plaintiffs filed the instant action on March 3, 1997 while they were prisoners within the custody of the Georgia Department of Corrections. Defendants filed a motion to dismiss based upon the prisoners' failure to exhaust their administrative remedies and based upon the prisoners' failure to allege an injury in fact as required under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). The district court granted defendants' motion in its entirety. Plaintiffs appealed the ruling of the district court to the Eleventh Circuit Court of Appeals.

The Court of Appeals affirmed the district court in part and reversed in part. All parties moved for *en banc* consideration. The Court of Appeals granted the parties *en banc* review vacating the decision of the panel. The Eleventh Circuit Court of Appeals sitting *en banc*, affirmed the ruling of the district court in its entirety, reversing the panel in part. Plaintiffs now seek a Writ of Certiorari to this Court in seeking to overturn the *en banc* ruling of the Eleventh Circuit Court of Appeals.

STATEMENT OF THE FACTS

Plaintiffs' complaint alleges that twenty-two tactical squad officers verbally and physically abused them, and subjected each of them to a strip search during a "shakedown" (a systemic search) authorized and directed by Defendant officials at Dooly State Prison on October 23, 1996.

The following inmates, who are named Plaintiffs in the above-referenced case, did not file grievances concerning the shakedown at Dooly: Samuel Locklear; Alan Kilgore; Leroy Langes; Farrell Nation; Daytron Brinkley; and William Dailey. They now claim that they were humiliated and verbally abused.

Plaintiff Danny Chadwick filed a grievance complaining only that he was subjected to a strip search in the presence of women. This grievance was denied. Chadwick did not appeal the denial of this grievance.

Plaintiff James Wade filed a grievance complaining that he was subjected to a strip search in the presence of women and that he was forced to "dry shave." This grievance was denied and Wade appealed. However, Wade did not raise the issue of the alleged "dry shave" on appeal but still asserts this claim in the case at bar.

Plaintiff Frederick Harris filed a grievance complaining only that he was subjected to a strip search in the presence of women. He did not grieve any other matter regarding the shakedown of October 23, 1996. This grievance was denied and Harris appealed. Harris does not allege anywhere in the Complaint that he suffered any physical injury.

Plaintiff Lenois Cook filed a grievance complaining that he was subjected to a strip search in the presence of women and that his watch was broken during the shakedown. This grievance was denied and Cook appealed. Cook does not allege anywhere in the Complaint that he suffered any physical injury.

Plaintiff Willie Hooks filed a grievance complaining that he was subjected to a strip search in the presence of women, that officers used excessive force in removing him from his cell and that the officers verbally abused him. This grievance was denied and Hooks appealed. However, Hooks did not mention the alleged excessive force or verbal abuse on appeal. Moreover, Hooks does not allege in the Complaint that he suffered any physical injury.

According to Plaintiffs' counsel all but three of them have been released from prison since the time this lawsuit was originally filed.

REASONS FOR NOT GRANTING THE WRIT

I. The Eleventh Circuit Court of Appeals correctly concluded that a prisoner must exhaust his administrative remedies prior to initiating litigation, as dictated by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).

Petitioners allege that since the remedies sought may not have been available or granted through the administrative process available at the institution, they should not have been required to exhaust their administrative remedies prior to filing the lawsuit. Petitioners further argue that despite the fact that all were prisoners at the time the lawsuit was filed, and thus could have exhausted their administrative remedies prior to initiating litigation, that once released, the Prison Litigation Reform Act (hereinafter "Act") should not apply. Petitioners are simply incorrect.

The Act is clear when it states, "No federal civil action *may be brought* by a prisoner confined . . . until such remedies as are available are exhausted." 42 U.S.C. § 1997e(e) (emphasis supplied). There is no provision delineating which specific remedies may be sought nor is there an exclusion for a change of status concerning confinement during or at the conclusion of the litigation. The Act simply states that if a person is a prisoner *when he files a lawsuit,* he cannot bring the claim until his administrative remedies have been exhausted.

Petitioners also refuse to recognize the purpose of the Act. Yet, Congressional intent is clear: the purpose of the Act is to discourage prisoners with nothing but time on their hands from filing frivolous litigation. This purpose makes the plain reading of the statute that much clearer. As the *en banc* court states, "the courts must presume that a legislature says in a statute what it means and means what it says." (Appendix to Petitioners' brief p. 3). When the legislature stated that "no action may be brought" absent the exhaustion of the available administrative remedies that is what it meant. There is nothing in the legislative history to indicate that some other interpretation should be made. Because the language is clear, the Court cannot provide an additional interpretation of this language.

Petitioners argue that the exhaustion requirement is futile because the remedies sought by Petitioners are not available and because many of the Petitioners are no longer in custody. Petitioners also contend that many other individuals were not granted relief by the administrative process and thus conclude that they would not obtain relief either. The reality is that no one will ever

know whether Petitioners could have obtained any relief as they did not bother to file a grievance prior to initiating this action. *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999). Petitioners' assertions regarding any possible administrative result are nothing but speculation. As this Court observes, "negotiation may be more effective if a lawsuit is not on file." *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *McNeil v. United States*, 508 U.S. 106 (1980).

Under Petitioners' theory, a district court would be required to examine each complaint to assess the viability of the administrative process including the exploration of other similar grievances to determine if the result of those grievances could be viable in the action at hand. This is an absurd burden for the lower courts and flies directly in the face of the plain language of the Act.

While admittedly there is a split in the circuits involving the applicability of the Act's exhaustion requirement to claims for monetary damages, the uniqueness of the underlying circumstances in this case is unlikely to have frequent repetition. In this case, six of the petitioners were in custody at the time suit was filed but released prior to the district court's ruling on the motion to dismiss. As is pointed out in *Harper v. Jenkin*, 179 F.3d 1311 (11th Cir. 1999), if the prisoners could have demonstrated good cause for their delay in filing a grievance, then the administrative process would have been available to them. Since six of the Petitioners were prisoners when the action was brought, but were released prior to a ruling on the motion to dismiss several months later, they are unable to file a grievance even out of time.

This is a rare situation which is not subject to frequent repetition and thus Petitioners' petition should be denied.

II. This Court should deny certiorari on the issue of due process as it is applied to the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) as the issue was not addressed by the courts below.

Petitioners admit that the Eleventh Circuit did not address the Georgia Department of Correction's requirement that grievances must be filed within five days. (Pet. Brief p. 6). Neither the panel nor the *en banc* decision of the Eleventh Circuit addressed the applicability of the due process clause to the exhaustion requirement of the Act. Since this issue was not decided by the courts below, it is not appropriate for review here.

The Court traditionally denies review of questions not decided below unless error is "obvious, or . . . seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Petitioners offer no such issue. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). "These principals help to maintain the integrity of the process of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). There is no reason why this Court should deviate from its usual course on issues not addressed by the courts below.

III. The Court should deny certiorari to determine if allegations of abuse of prisoners falls within Congress' broad definition of "conditions of confinement," because that issue was not addressed by the courts below.

Once again Petitioners attempt to raise an issue which has not been ruled upon below. (Pet. Brief p. 17). Therefore, for the reasons discussed under the previous section, the petition should be denied.

Moreover, it should be noted that Congress very clearly defined what is meant by conditions of confinement. The Act explicitly states, "conditions of confinement" means "any civil proceeding arising under federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 42 U.S.C. § 1997e(a). Unless Petitioners are alleging that Respondents are not government officials, in which case any action would not have been under color of state law, or that their lives were not affected by the alleged excessive use of force, in which case they would be hard pressed to establish a constitutional violation, then these allegations are covered by the Act. Certiorari should be denied in light of such clear legislative language.

IV. Congress has the authority to limit claims for monetary damages in actions brought under 42 U.S.C. § 1983 where a prisoner has alleged a *de minimus* injury and may receive injunctive relief.

Congress created a remedy for constitutional violations committed by state actors when they passed 42 U.S.C. § 1983. There is no constitutional right to monetary relief for an alleged constitutional violation. But, what Congress gives, Congress may also take away, and Congress did take away some of the remedies available to prisoners under 42 U.S.C. § 1983 by passing the Prison Litigation Reform Act. Since 42 U.S.C. § 1983 is a congressionally created remedy, it can be limited by the very entity that created it. *Zehner v. Trigg*, 133 F.3d 459, 461-463 (7th Cir. 1997). As the Eleventh Circuit panel decision correctly states, the Petitioners are asking the Court to "rewrite § 1997e(e) [of the PLRA] by construing it not to apply to constitutional claims." (Appendix to Petitioners' brief p. 27). That Code section states, "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). Petitioners argue that the appellate court's interpretation of the Act has left the released Petitioners without a remedy for relief. Petitioners claim that the court's interpretation flies in the face of the Constitution. The circuit courts have consistently determined that claims for injunctive relief are still allowed where there is no showing of physical injury. *See Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Perkins v. Kansas City Department of Corrections*, 165 F.3d 803, 808 (10th Cir. 1999); *Davis v. District of*

Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Zehner v. Trigg*, 133 F.3d 459 (7th Cir. 1997).

Petitioners claim that since many of them were released from custody, they are now without a legal remedy. Nonetheless, at the time the suit was filed, injunctive relief was available to all of the Petitioners. No motion for preliminary injunction was filed. For whatever reason, counsel for Petitioners failed to seek injunctive relief when it was available to them. They can not now cry foul because the only remedy available to them has slipped through their fingers.

Further, construing the statute in the manner the Petitioners propose would contradict the purpose behind the Act. As the *en banc* decision points out, the very purpose behind the Act is to curtail frivolous litigation by prisoners. Since the majority of prisoners' suits involve constitutional claims, to exclude constitutional claims from the injury requirement would effectively nullify the very purpose of the Act. (Petitioners' brief appendix p. 28).

In this case below, the Eleventh Circuit applied this Court's ruling of what would be termed a constitutional violation in a case involving excessive use of force and applied it to define the meaning of physical injury under the Act. *Hudson v. McMillian*, 503 U.S. 1 (1992). The "injury" requirement of the Act is defined as that which is more than *de minimus*. In addition to this finding, the court found that upon a plain reading of the statute, in order to maintain a federal cause of action for damages, a prisoner must show that he received a physical injury.

The ruling of the court below was correct. Therefore, the petition should be denied.

CONCLUSION

WHEREFORE, based on the foregoing, Respondents pray that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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